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IN THE

Supreme Court of the United States

October Term, 1968
No. 375—~~Miscellaneous~~

VELMA L. MENGELKOCH, *et al.*,

Appellant,

vs.

INDUSTRIAL WELFARE COMMISSION, and NORTH AMERICAN AVIATION, INC.,

Appellees.

Motions to Affirm Order of Three-Judge Court and to Dismiss Appeal From Order of One-Judge District Court, With Points and Authorities in Support Thereof.

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Motions to Affirm Order of Three-Judge Court and to Dismiss Appeal From Order of One-Judge District Court, With Points and Authorities in Support Thereof.

Appellee Industrial Welfare Commission of the State of California[1] pursuant to Supreme Court Rule 16(1) (a) and (c), moves to affirm the order of the United States District Court, Central District of California, dated May 10, 1968, sitting as a three-judge court and to dismiss the appeal from the order of the one-judge

[1]The Division of Industrial Welfare of the State of California also was sued as a defendant in the action below. However, this appeal has not been taken against the Division, and accordingly, this motion is made only on behalf of the remaining state-agency appellee, the Industrial Welfare Commission of the State of California.

district court of that district dated May 10, 1968, on the following grounds:

A. The Issues Raised by the Appeal From the Order of the Three-Judge Court Are Not Substantial and Therefore Further Review by This Court Is Not Necessary.

1. The jurisdiction of a three-judge court will not be invoked unless a substantial constitutional question is involved; such a question was not involved in the case at bar since the constitutionality of statutes limiting the working hours of women has previously been upheld by this Court.

2. A provision setting maximum working hours for women does not violate the Fourteenth Amendment to the United States Constitution.

3. A three-judge court may not be invoked solely to determine whether the Supremacy Clause makes a state statute unconstitutional.

B. This Court Does Not Have Jurisdiction to Entertain a Direct Appeal From a One-Judge District Court.

These motions are based upon this document, the points and authorities attached hereto and the transmitted record in this case.

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POINTS AND AUTHORITIES IN SUPPORT OF MOTIONS.

Introduction.

Appellant Velma L. Mengelkoch sued to have section 1350[2] of the California Labor Code providing for maximum working hours for women declared unconstitutional as violating the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, or being invalid as conflicting with Title VII of the Civil Rights Act of 1964 [42 U.S.C. §2000(e)-7]. Appellant, suing in her own behalf and purportedly in behalf of all similarly situated women in the State of California, sought to enjoin appellee Industrial Welfare Commission and its then co-defendant the Division of Industrial Welfare of the State of California from enforcing section 1350 of the California Labor Code and to enjoin North American Aviation, Inc., from further violations of Title VII of the Civil Rights Act.

After appellant invoked a three-judge court pursuant to 28 U.S.C. section 2281, appellee Industrial Welfare

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[2]California Labor Code section 1350 provides in part:

"No female shall be employed in any manufacturing, mechanical, or mercantile establishment or industry, laundry, cleaning, dyeing, or cleaning and dyeing establishment, hotel, public lodginghouse, apartment house, hospital, beauty shop, barbershop, place of amusement, restaurant, cafeteria, telegraph or telephone establishment or office, in the operation of elevators in office buildings, or by any express or transportation company in this state, more than eight hours during any one day of 24 hours or more than 48 hours in one week. . . ."

Commission and its then codefendant the Division of Industrial Welfare challenged the jurisdiction of both the three-judge court and the one-judge district court and moved to dismiss the action. The three-judge court granted the motion and ordered itself dissolved on the grounds that:

1. The complaint failed to raise a substantial constitutional question in that the United States Supreme Court had previously held that it was not a denial of equal protection for a state to set maximum hours of work for women.

2. The contention that the provision setting maximum working hours for women conflicts with a federal statute, namely Title VII of the 1964 Civil Rights Act, cannot be urged as a basis for invoking the jurisdiction of a three-judge court.

After the three-judge court ordered itself dissolved, the one-judge district court ordered the action dismissed on the ground of equitable abstention.

ARGUMENT.

I.

The Issues Raised by the Appeal From the Order of the Three-Judge Court Are Not Substantial and Therefore Further Review by This Court Is Not Necessary.

A. To Invoke the Jurisdiction of a Three-Judge Court, a Substantial Constitutional Question Must Be Involved; Such a Question Is Not Involved Where as in the Case at Bar Constitutionality Has Previously Been Upheld by the United States Supreme Court.

A three-judge court may be invoked only to hear a substantial constitutional question, but it will not hear a matter in which previous decisions of the United States Supreme Court have foreclosed the subject. *California Water Service Co. v. City of Redding,* 304 U.S. 252, 255 (1938); *German v. South Carolina State Ports Authority,* 295 F.2d 491 (4th Cir. 1961).

This Court has previously ruled upon the issue sought to be relitigated in the matter at bar in *Miller v. Wilson,* 236 U.S. 373 (1915) by holding that the California statute setting maximum hours for women was constitutional and did not violate the equal protection provision. A similar statute was sustained in *Muller v. Oregon,* 208 U.S. 412 (1908).

The three-judge procedure is extraordinary and imposes a heavy burden on the federal courts, resulting in expense and delay. The procedure is one that should not be lightly extended. Restrictions on appellate review in the Supreme Court would be impaired were groundless allegations sufficient to enable a plaintiff to litigate his claim before a three-judge court. *California Water Service Co. v. City of Redding,* 304 U.S.

252 (1938). The result of this Court's prior determinations is that the instant matter does not pose a substantial constitutional question, and the order of the three-judge court was correct and should be affirmed. Affirmance will result in a more orderly determination of the issue by requiring appellant to litigate her case before the district judge sitting alone and then pursue her right of appeal to the Court of Appeals and then to this Court.

B. The Provision Setting Maximum Working Hours for Women Does Not Violate the Fourteenth Amendment to the United States Constitution.

Statutes limiting the working hours of women have been upheld as reasonable because women need sufficient time to discharge their maternal functions, for the rearing and education of children and maintenance of the home. *Miller v. Wilson,* 236 U.S. 373, 381; *Muller v. Oregon,* 208 U.S. 413, 420 n. (1908).

The passage of time has not dimmed the validity of this Court's reasoning in *Miller* and *Muller, supra.* Years later both decisions were cited with approval in *West Coast Hotel Co. v. Parrish,* 300 U.S. 379, 394-395, 400 (1937). In *United States v. Darby,* 312 U.S. 100, 125 (1941) citing the *Muller* decision this Court stated: ". . . Nor is it any longer open to question that it is within the legislative power to fix maximum hours. . . ."

More recently this Court in *Hoyt v. Florida,* 368 U.S. 57 (1961) again recognized that women need

time to properly fulfill their role in the home by upholding a state statute providing that women could not be required to perform jury duty. Importantly that decision stated:

> ". . . Despite the enlightened emancipation of women from the restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men, woman is still regarded as the center of home and family life. . . ." (at pp. 61-62.)

The statute in *Hoyt* and provisions limiting working hours for women are similar for both insulate women from time consuming tasks which would take them away from the home thereby preventing the performance of their family duties. A statutory classification having some reasonable basis is not unconstitutional under the Fourteenth Amendment. *Morey v. Doud,* 354 U.S. 457, 463 (1957).

C. A Three-Judge Court May Not Be Invoked Solely to Determine Whether the Supremacy Clause Makes a State Statute Unconstitutional.

The jurisdiction of a three-judge court pursuant to 28 U.S.C. section 2281 applies only to actions which rely upon a substantive provision of the United States Constitution such as due process or equal protection. A three-judge court does not have jurisdiction solely to determine if the Supremacy Clause makes invalid a state statute since the determination of that question involves only a federal-state statutory conflict. *Swift & Co. v. Wickham,* 382 U.S. 111 (1965).

Beyond the application of the Fourteenth Amendment, the instant case involves only the question of

whether California's maximum work law for women conflicts with Title VII of the Civil Rights Act of 1964. That being the case the three-judge court properly held that it was without jurisdiction to determine that issue.

II.

The United States Supreme Court Does Not Have Jurisdiction to Entertain a Direct Appeal From an Order of a One-Judge District Court; Therefore the Appeal From That Order Should Be Dismissed.

Appellant improperly seeks to invoke the jurisdiction of this Court to appeal an order of the one-judge District Court dismissing the instant action on the ground of equitable abstention. The threshold question that must be resolved is whether or not the order is directly appealable to this Court. Appellee contends that it is not.

While this Court has jurisdiction to hear a direct appeal from a decision of a three-judge court, it has no jurisdiction to hear a direct appeal from a one-judge District Court. Such jurisdiction is lodged in the Courts of Appeal. 28 U.S.C. §§ 1291, 1253. See *Stuart v. Wilson,* 282 F.2d 539, 541-42 (5th Cir. 1960). Indeed appellant has recognized this principle by filing Notice of Appeal to the Court of Appeals, Ninth Circuit. (Jurisdictional Statement, p. 3. n. 2; Transmitted Record p. 107.)

Therefore the attempted appeal from the decision of the one-judge District Court should be dismissed.

Conclusion.

For the foregoing reasons, appellee respectfully requests that its motions to affirm the order of the three-judge district court and to dismiss the appeal from the order of the one-judge district court be granted.

Respectfully submitted,

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